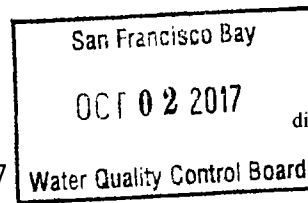


BRISCOE IVESTER & BAZEL LLP

155 SANSOME STREET
SEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104
(415) 402-2700
FAX (415) 398-5630



David M. Ivester
(415) 402-2702
divester@briscoelaw.net

September 29, 2017

BY FEDERAL EXPRESS OVERNIGHT AND EMAIL

Xavier Fernandez
Senior Environmental Scientist
San Francisco Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

Re: Dutra Haystack Asphalt Plant Project, Sonoma County; CIWQS Place ID 767268

Dear Mr. Fernandez:

I write on behalf of San Rafael Rock Quarry, Inc., dba Dutra Materials, to amend and augment its request for water quality certification (submitted on December 15, 2014) to confirm that it is an application for a development permit and enclose a revised Alternatives Analysis for the Dutra Haystack Asphalt Plant Project (dated September 30, 2017; "Alternatives Analysis"), a revised Wetlands Mitigation and Monitoring Plan (September 2017), and a revised Management Plan (September 2017), together with a copy of a letter transmitting these documents to Corps of Engineers. The Alternatives Analysis is intended to assist the Corps in its analysis of alternatives in compliance with the Environmental Protection Agency's Guidelines (40 C.F.R. Part 230).

I am pleased to report that through detailed analysis Dutra Materials has determined that it can practicably achieve the overall project purpose with an on-site alternative that would avoid filling 1.32 acres of wetland proposed to be filled under the proposed project. This Reduced Fill Alternative would fill only 0.52 acre of wetland, and it would not result in any other significant adverse environmental consequences. As explained in the Alternatives Analysis, this Reduced Fill Alternative is the least environmentally damaging practicable alternative under the section 404(b)(1) Guidelines.

In light of this determination, Dutra Materials proposes to implement the Reduced Fill Alternative rather than the proposed project, and accordingly asks the Corps and Regional Board to review and approve that alternative.

As the Reduced Fill Alternative would have substantially less impact on wetlands than the proposed project, the measures needed to mitigate those impacts accordingly would be substantially less as well. The Reduced Fill Alternative would fill only 0.52 acre of wetland, less than one third the 1.84 acres of wetlands proposed to be filled by the proposed project.

While the reduction of wetland impacts warrants corresponding reduction of mitigation, Dutra Materials nonetheless proposes to provide the same mitigation it had proposed for the proposed project. Dutra Materials has revised the Mitigation and Monitoring Plan and the Management Plan to reflect its decision to propose the Reduced Fill Alternative in place of the previously proposed project and otherwise propose substantially the same mitigation measures proposed for the previously proposed project. The proposed mitigation includes creation of 2.66 acres of seasonally inundated wetland, enhancement of 8.21 acres of seasonally inundated wetland, restoration of 0.02 acres of brackish marsh fronting the Petaluma River, reservation of 0.57 acre of seasonally inundated wetland, and enhancement of 3.12 acres of upland buffer. Implementation of this mitigation would mitigate the wetland impacts of the Reduced Fill Alternative at a replacement ratio of 13:1

I write as well to respond to your letter of November 10, 2016. The Alternatives Analysis has been revised so as generally to address the various topics raised in that letter. Here, I more specifically address in turn each of the eleven numbered information items presented in the letter.

1. Basic Project Purpose and Overall Project Purpose

The Alternatives Analysis discusses at length both the basic project purpose and the overall project purpose. It explains the pertinent agency guidance and law on the subject and describes the development of the basic project purpose and overall project purpose of the Haystack Asphalt Plant Project in keeping with that guidance and law.

As noted in the Corps' Public Notice No. 2003-28140, the Corps determines the basic project purpose in order to ascertain whether a project is water dependent. The Corps determined that the basic project purpose of the Dutra Haystack Asphalt Plant Project is "to construct a new asphalt plant and associated features" (*id.* at 2) and, predicated on that, determined that "the project is not dependent on location in or proximity to waters of the United States to achieve the basic project purpose" (*id.* at 4).

The overall project purpose, which is used to identify and evaluate alternatives, more precisely defines the project purpose with respect to the applicant's goals, critical project elements, and the geographic area of the project, so that real world alternatives can be identified and analyzed. In keeping with the Guidelines and pertinent agency guidance, Dutra Materials stated the overall project purpose in the Alternatives Analysis as follows:

The overall project purpose is to construct and operate a commercially competitive asphalt processing facility with access to a navigable waterway to provide asphalt, aggregate, sand, and related products for public and private construction projects in northern and western Marin County and southern Sonoma

County. The proposed facility is intended to replace an earlier facility and, like it, serve as an integral part of regional operations of The Dutra Group, which operates an aggregate quarry on the shore of San Francisco Bay, a barge and towing fleet, and materials distribution centers.

This overall project purpose serves as the predicate for identifying and analyzing potential alternatives to the proposed project.

The no-project alternative, mentioned in your letter, was among the alternatives evaluated by the County in its Draft Environmental Impact Report (“DEIR”) prepared under the California Environmental Quality Act (“CEQA”) because state and local agencies are specifically required to consider a no-project alternative as part of their environmental review of projects under that Act. (14 Cal. Code Reg. § 15126.6(e).) The DEIR was the appropriate place for consideration of this alternative. A similar requirement applies to federal agencies’ review of projects under the National Environmental Policy Act (“NEPA”). (40 C.F.R. § 1502.14(d).)

Neither the Clean Water Act nor the Guidelines contain any such requirement; rather, the Guidelines call for analysis of potential alternatives that would achieve the overall project purpose. (40 C.F.R. § 230.10(a)(2); 45 Fed. Reg. 85336, 85339 (1980).)

The no-project alternative is briefly discussed in the Alternatives Analysis (and was discussed in earlier iterations of the Alternatives Analysis) primarily for informational purposes, since the initial screening of potential alternatives considered alternatives generated as part of the County’s environmental review under CEQA and eliminated the no-project alternative from further analysis under the Guidelines because it plainly would not achieve the overall project purpose. The County found that the no-project alternative “would not meet any of the project objectives.” (DEIR at VII-8.)

The foregoing discussion of the Alternatives Analysis’s treatment of the overall project purpose and no-project alternative effectively addresses and obviates the further suggestion of some sort of analysis of market demand for the project. Beyond that, it bears also noting that the Guidelines do not require any such analysis of a project; rather, the Guidelines call for evaluating whether there is a less environmentally damaging practicable *alternative* to the project that would achieve the overall project purpose. Indeed, the Corps’ regulations provide that “[w]hen private enterprise makes application for a permit, it will generally be assumed that appropriate economic evaluations have been completed, the proposal is economically viable, and is needed in the marketplace.” (33 C.F.R. § 320.4(q).) Moreover, where an applicant states a “legitimate” purpose, as Dutra Materials has here, the Corps is not entitled to reject the applicant’s determination that a particular type of development is economically advantageous to its operations. (*Sylvester v. U.S. Army Corps of Engineers*, 882 F.2d 407, 409 (9th Cir.1989);

Hillsdale Environmental Loss Prevention, Inc. v. U.S. Army Corps of Engineers, 702 F.3d 1156, 1172 (10th Cir. 2012).)

2. Project Schedule

The Alternatives Analysis extensively discusses several alternatives, including those mentioned in your letter, and the various reasons they are not practicable alternatives that achieve the overall project purpose with less adverse impact on the aquatic ecosystem and without other significant adverse environmental consequences. Significant delay resulting from permit processes required for alternatives is a substantial concern, but the conclusions of the Alternatives Analysis with respect to the various alternatives do not rest on any such delay.

3. Barge Access

As explained in the Alternatives Analysis, a critical aspect of the overall project purpose is to construct and operate an asphalt processing facility with access to a navigable waterway. Such access is critical to the project for at least two reasons.

First, because aggregate and other constituents of asphalt paving have a low value to weight ratio (i.e., they are heavy and inexpensive), the cost of transportation looms large in business operations to deliver such products to the market. Because transporting such bulky, heavy materials by barge on navigable waters is considerably more cost effective than transporting them by truck on roads, an asphalt plant with effective access to a navigable waterway will enjoy a cost advantage in its operations. (See, e.g., Center for Ports and Waterways, Texas A&M Transportation Institute, *A Modal Comparison of Domestic Freight Transportation Effects on the General Public: 2001-2014* (January 2017), explaining that inland waterway transport continues to compare favorably to both rail and truck transport with respect to energy efficiency, cargo capacity, congestion, emissions, safety risks, and infrastructure impacts.) Central to Dutra Materials' overall project purpose naturally is to construct and operate a commercially competitive facility.

Second, apart from the foregoing general cost considerations, Dutra Materials has good reason, particular to its business operations, to include access to a navigable waterway as an essential aspect of its overall project purpose. Dutra Materials is an integral component of The Dutra Group's integrated business operations in northern California. Dutra Materials' primary source of aggregate material is The Dutra Group's San Rafael Rock Quarry, which is located on the shore of San Pablo Bay with barge access to the Bay's open waters. In connection with this quarry, The Dutra Group operates a marine fleet of barges, derricks, and tug boats. Dutra Materials has planned the Haystack Asphalt Plant with access to a navigable waterway in order to fit seamlessly into The Dutra Group's existing integrated business operations.

Dutra Materials' statement of its overall project purpose is well founded, reasonable, and legitimate. In defining the overall project purpose, the Corps naturally considers the needs and objectives of the applicant. (See, e.g., Corps of Engineers, Memorandum for Commanders, Major Subordinate Commands and District Commands: Updated Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program, p. 15 (July 1, 2009).) Indeed, "it would be bizarre if the Corps were to ignore the purpose for which the applicant seeks a permit and to substitute a purpose it deems more suitable." (*Sylvester v. U.S. Army Corps of Engineers*, 882 F.2d 407, 409 (9th Cir. 1989), quoting *Louisiana Wildlife Federation v. York*, 761 F.2d 1044, 1048 (5th Cir. 1985); *Butte Environmental Council v. U.S. Army Corps of Engineers*, 607 F.3d 570, 581 (9th Cir. 2010).)

The existence of asphalt plants without barge access, noted in your letter, of course does not preclude Dutra Materials from proposing an asphalt plant with such access. As Dutra Materials has with good reason stated a legitimate overall project purpose including access to a navigable waterway, the Corps is not entitled to reject its determination that this particular type of development is economically advantageous to its operations. (*Sylvester v. U.S. Army Corps of Engineers*, 882 F.2d at 409 (9th Cir.1989); *Hillsdale Environmental Loss Prevention, Inc. v. U.S. Army Corps of Engineers*, 702 F.3d 1156, 1172 (10th Cir. 2012).)

4. Truck and Rail Access

Noting that an earlier version of the Alternatives Analysis observed some alternatives have poor highway access (which would require trucks to use local streets to reach Highway 101), your letter asks for documentation of the characteristics that make using local streets logistically infeasible.

The Alternatives Analysis has been augmented to describe the transportation constraints in more detail and to observe that the County found with respect to the Downtown Petaluma alternative that "[t]ruck traffic in the downtown area could create significant traffic congestion and safety hazards on local surface streets." (DEIR at VII-5.) It includes discussion and documentation of the impacts of heavy truck traffic on local streets as well.

Your letter also states that evaluation of the Port Sonoma, Redwood Landfill, and Lakeville Highway alternatives does not include information about the logical feasibility of using truck or rail to deliver materials and/or transport products.

To the extent that this statement refers to use of trucks or rail instead of barges, that subject is addressed above. To the extent that this statement refers to use of trucks to deliver products to market, it should be noted that in the Alternatives Analysis off-site alternatives were initially screened for sites generally located on or near a road suitable for heavy truck traffic leading within five miles to a Highway 101 interchange, and only if transportation posed a

constraint with respect to any particular alternative was it further discussed in the Alternatives Analysis. Under the Guidelines, the feasibility of truck or rail transportation for delivery of asphalt paving products with respect to any particular alternative need be discussed only if it reveals the alternative to be impracticable or otherwise unsuitable.

5. Natural Gas Line Availability

The availability of a suitable natural gas line is critical to the practicability of any alternative for construction and operation of an asphalt plant. However, owing to difficulties in readily identifying the locations of gas lines in the vicinity of alternative sites and assessing the various constraints to connecting with any such line, Dutra has elected to omit discussions of gas lines in the revised Alternatives Analysis. Accordingly, the Alternative Analysis does not predicate any conclusions that alternative sites are impracticable on the unavailability of a natural gas line.

6. Omitted

As your letter skips from item 5 to item 7, I include this section here merely to note the omission and retain the same numbering as your letter.

7. Site Size

As explained in more detail in the revised Alternatives Analysis, an appropriately configured site of at least five acres is needed to accommodate the essential features of the project, the plant, associated outbuildings, storage areas, and truck access, loading, and parking areas.

8. Timely Delivery of Asphalt Materials to Market

The Alternatives Analysis explains the need to locate the asphalt plant within five miles of Highway 101 in order to practicably deliver products to the market.

With respect to questions whether the project could dispense with providing hot mix asphalt and rely solely on providing warm mix asphalt, a commercially competitive asphalt plant achieving the overall project purpose reasonably needs to provide the range of products desired in the market. It would not do to limit the plant to one or another product when those in the market call for both.

9. Selection of Off-Site Locations

The revised Alternatives Analysis explains in more detail how off-site alternative locations were identified and screened. It evaluates eight alternative sites in detail, including the

Redwood Landfill site (which I presume is what was meant by the reference in your letter to the Novato Landfill).

10. Cost Analysis

The Alternatives Analysis discusses cost factors with respect to a particular alternative when pertinent to determining whether that alternative is impracticable.

The Alternatives Analysis need not discuss cost or other factors with respect to the proposed project in order to show the practicability of the proposed project. The Guidelines do not require or call for that. Moreover, as noted above, “[w]hen private enterprise makes application for a permit, it will generally be assumed that appropriate economic evaluations have been completed, the proposal is economically viable, and is needed in the marketplace.” (33 C.F.R. § 320.4(q).) Compliance with the Guidelines requires analysis of *alternatives* to the proposed project in order to ascertain whether “there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.” (40 C.F.R. § 230.10(a).)

11. Feasibility of Original Proposed Project Alternative

Expressing uncertainty whether Dutra Materials will be able to use the Landing Way off-loading facility of Shamrock Materials, Inc., your letter questions whether the proposed project is practicable and asks for documentation that Dutra Materials has permission to use the Landing Way facility.

As noted above, the Guidelines do not call for a showing of the practicability of the proposed project, and the Corps’ regulations provide that the need for and economic viability of a proposed project is generally assumed.

In any event, Dutra Materials has received confirmation from Shamrock Materials, Inc., that it can use the Landing Way facility for operation of the Haystack Asphalt Plant. Documentation to that effect in the form of a copy of a letter from the President of Shamrock Materials, Inc., to the Regional Board, dated April 21, 2017, is enclosed.

12. Other Environmental Factors

In keeping with the Guidelines, the Alternatives Analysis discusses other significant environmental consequences with respect to a particular alternative when pertinent to determining whether that alternative is impracticable. While CEQA generally requires environmental review documents (initial studies, negative declarations, and EIRs) prepared to comply with that statute to address the full range of potential environmental effects (e.g., air

BRISCOE IVESTER & BAZEL LLP

September 29, 2017

Page 8


quality, noise, and biological resources) of projects and alternatives (14 Cal. Code Reg. §§ 15063(d), 15371, 15126.2, 15126.6, 15128, 15130; CEQA Guidelines Appendix G), the Guidelines do not call for any such general review. Rather, the Guidelines call for an analysis of alternatives focused on determining whether “there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.” (40 C.F.R. § 230.10(a).) The enclosed Alternatives Analysis does just that.

With the submission of the revised Alternatives Analysis, revised Mitigation and Monitoring Plan, and revised Management Plan augmenting its earlier application and submittals, Dutra has submitted all of the information and items listed in section 3856 of Title 23 of the California Code of Regulations for the contents of a complete application and described in the Instructions of the Regional Board (revised December 2009) for an application for certification. Understanding its application thus to be complete, Dutra hopes the Regional Board shares that understanding. Dutra also naturally anticipates and welcomes further discussing any aspects of the project with the Regional Board and further clarifying and supplementing the information required for the application (as provided in Government Code section 65944) in order to facilitate the Regional Board’s review and consideration of the project. In that regard, Dutra plans to provide responses to the comments on the public notices of the Corps and Regional Board.

We look forward to hearing from you. If you have any questions about the enclosed materials or wish to discuss any aspect of the project, please call me at your convenience.

Sincerely yours,

BRISCOE IVESTER & BAZEL LLP

A handwritten signature in black ink, appearing to read "David Ivester", written in a cursive style.

David Ivester

DMI/DMI
Enclosure